UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRINKER INTERNATIONAL PAYROLL COMPANY, L.P. Petitioner, vs. NATIONAL LABOR RELATIONS BOARD Respondent.	)	**PETITION FOR REVIEW**

Brinker International Payroll Company, L.P. hereby petitions the Court for review of the Decision and Order of the National Labor Relations Board entered on December 1, 2015, in the matter of *Brinker International Payroll Company L.P., a limited partnership and The Sawaya & Miller Law Firm*, Case 27-CA-110765, a copy of which is attached hereto. Petitioner seeks review of the Board's Order and requests that the entire Order be overturned or set aside.

Dated this 4th day of December, 2015.

Respectfully submitted,
JACKSON LEWIS P.C.

By: s / Kelvin C. Berens

Kelvin C. Berens
Ross M. Gardner
JACKSON LEWIS, P.C.
10050 Regency Circle, Suite 400
Omaha, NE 68114
Telephone: (402) 391-1991
Facsimile: (402) 391-7363
E-mail: berensk@jacksonlewis.com
gardnerr@jacksonlewis.com

Attorneys for Petitioner,
BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.,	)
Petitioner,	)
vs.	)
NATIONAL LABOR RELATIONS BOARD	)
Respondent.	)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 4th day of December, 2015, a true and correct copy of the above and foregoing **Petition for Review** was served by certified, first-class United States mail, postage prepaid, upon the following:

Linda Dreeben, Esq.
Deputy Associate General Counsel
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

David Miller and Leslie Krueger-Pagett
The Sawaya Law Firm
1600 Ogden Street
Denver, CO 80218-1414

Renée C. Barker
Counsel for the General Counsel
National Labor Relations Board
Region 27
Byron Rogers Federal Office Bldg.
1961 Stout Street, Suite 13-103
Denver, CO 80294

Wanda Pate Jones
Regional Director
National Labor Relations Board
Region 27
Byron Rogers Federal Office Bldg.
1961 Stout Street, Suite 13-103
Denver, CO 80294

s / Kelvin C. Berens
Kelvin C. Berens

4831-9865-3218, v. 1

Brinker International Payroll Company L.P. *and* The Sawaya & Miller Law Firm. Case 27–CA–110765

December 1, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On June 4, 2014, Administrative Law Judge Lauren Esposito issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board's decision in *D. R. Horton*, 357 NLRB No. 184 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an arbitration agreement that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. The judge also found, relying on *D. R. Horton* and *U-Haul of California*, 347 NLRB 375, 377–378 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007), that maintaining the arbitration agreement violated Section 8(a)(1) because employees reasonably would believe that it bars or restricts their right to file unfair labor practices with the Board.

In *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), enf. granted in part, denied in part --- F.3d --- (5th Cir. 2015), the Board reaffirmed the relevant holdings of *D. R. Horton*, supra.

The Board has considered the decision and record in light of the exceptions and briefs, and, based on the judge's application of *D. R. Horton*, and on our subsequent decision in *Murphy Oil*, we affirm the judge's rulings, findings,[1] and conclusions,[2] and adopt the recommended Order as modified and set forth in full below.[3]

[1] We disagree with our dissenting colleague's argument that mandatory arbitration agreements do not violate the Act for the reasons stated in *Murphy Oil*, 361 NLRB No. 72, slip op. at 1–21.

In affirming the judge's findings, we do not rely on her citation to *Supply Technologies, LLC*, 359 NLRB No. 38 (2012); *Universal Lubricants*, 359 NLRB No. 157 (2013); *Federal Security*, 359 NLRB No. 1 (2012); and *Belgrove Post Acute Care Center*, 359 NLRB No. 77 (2013). See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

We reject the Respondent's argument that the General Counsel failed to properly allege that the Respondent violated Sec. 8(a)(1) by maintaining an arbitration agreement that would reasonably be interpreted as preventing employees from filing charges with the Board. The Complaint included the portion of the arbitration agreement governing external remedies and alleged that such language violated the Act. Further, the General Counsel's statement of position, included with the joint motion and Stipulation of Facts, alleged that the arbitration agreement was unlawful both because it prohibits employees from pursuing class or collective actions in judicial and arbitral forums and because employees would reasonably believe that the agreement bars or restricts their right to file charges with the Board. We find the Respondent was therefore on sufficient notice regarding the nature of the allegations against it.

We agree with the judge, for the reasons she stated, that employees would reasonably interpret the arbitration agreement to restrict their right to file charges with the Board, notwithstanding the language in the arbitration agreement stating that "[t]his agreement does limit an employee's ability to complete any external administrative remedy (such as with the EEOC)."

We also reject the Respondent's assertion that the judge erred by failing to issue a stay in this case pending the outcome of the civil litigation.

[2] The Respondent argues that the complaint is time-barred by Sec. 10(b) because the initial unfair labor practice charge was filed and served more than 6 months after then-employees Sarah Hickey, Amy Gulden, and Jay Ragsdale signed and became subject to the arbitration agreement. We reject this argument, as did the judge, because the Respondent continued to maintain the unlawful arbitration agreement during the 6-month period preceding the filing of the initial charge. The Board has long held under these circumstances that maintenance of an unlawful workplace rule, such as the Respondent's arbitration agreement, constitutes a continuing violation that is not time-barred by Sec. 10(b). See *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 & fn. 6 (2015); and *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 & fn. 7 (2015). It is equally well-established that an employer's enforcement of an unlawful rule, like the arbitration agreement here, independently violates Sec. 8(a)(1). See *Murphy Oil*, supra, at 19–21.

[3] Consistent with our decision in *Murphy Oil*, supra, at 21, we amend the judge's remedy and shall order the Respondent to reimburse Sarah Hickey, Amy Gulden, and Jay Ragsdale for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion in United States District Court to compel individual arbitration of their class or collective claims. See *Bill Johnson's Restaurants v. NLRB*, 461 U. S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). See *Teamsters Local 776 (Rite Aid),* 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses"), enfd. 973 F.2d 230 (3d Cir. 1992).

We shall also amend the judge's remedy to order the Respondent to notify the United States Court of Appeals for the Tenth Circuit and the district court that it has rescinded or revised the arbitration agreement and to inform the courts that it no longer opposes Sarah Hickey, Amy Gulden, and Jay Ragsdale's lawsuit on the basis of the arbitration agreement.

We shall substitute new notices to conform to the Order as modified.

ORDER

The National Labor Relations Board orders that the Respondent, Brinker International Payroll, Denver, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining and/or enforcing a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all applicants and current and former employees who were required to sign or otherwise become bound to the mandatory arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Notify the United States Court of Appeals for the Tenth Circuit and the United States District Court for the District of Colorado, in Civil Action No. 13-cv-00951-REB-BNB that it has rescinded or revised the mandatory arbitration agreement upon which it based its motion to dismiss Sarah Hickey, Amy Gulden, and Jay Ragsdale's collective lawsuit and to compel individual arbitration of their claims, and inform the courts that it no longer opposes the lawsuit on the basis of the arbitration agreement.

(d) In the manner set forth in this decision, reimburse Sarah Hickey, Amy Gulden, and Jay Ragsdale for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motion to dismiss the collective lawsuit and compel individual arbitration.

(e) Within 14 days after service by the Region, post at its Denver, Colorado locations copies of the attached notice marked "Appendix A," and at all other facilities where the unlawful arbitration agreement is or has been in effect, copies of the attached notice marked "Appendix B."[4] Copies of the notices, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix A" to all current employees and former employees employed by the Respondent at any time since February 7, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 27 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 1, 2015

_____

Mark Gaston Pearce, Chairman

_____

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the Respondent's Agreement to Arbitrate (Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement waives the right to participate in class or collective actions regarding non-NLRA employment claims. Sarah Hickey, Amy Gulden, and Jay Ragsdale signed the Agreement, and later the Charging Party, on behalf of Hickey, Gulden, Ragsdale,

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

and all others similarly situated, filed a class action lawsuit against the Respondent in federal court alleging violations of the Fair Labor Standards Act and the Colorado Wage Act. In reliance on the Agreement, the Respondent filed a motion to dismiss and compel arbitration (Motion to Compel Arbitration), which the court granted.[1] My colleagues find that the Respondent thereby unlawfully enforced its Agreement. I respectfully dissent from these findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[2]

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[3] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[4] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[5] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class waiver agreements;[6] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[7] Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

Because I believe the Respondent's Agreement was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in federal court seeking to enforce the Agreement. It is relevant that the federal court that had jurisdiction over the non-NLRA claims *granted* the Respondent's motion to compel arbitration. The reasonableness of the Respondent's

[1] *Hickey et al. v. Brinker International Payroll Co., L.P.*, No. 1:13-cv-00951-REB-BNB, 2014 WL 622883 (D. Colo. Feb. 18, 2014).

[2] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, No. 14-60800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015).

[3] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu,* 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

[4] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[5] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12-60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[6] The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil USA, Inc. v. NLRB*, above; *D. R. Horton, Inc. v. NLRB,* above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil,* 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co.*, No. 14-CV-5882 (VEC), 2015 WL 1433219 (S.D.N.Y. Mar. 27, 2015); *Nanavati v. Adecco USA, Inc.,* No. 14-cv-04145-BLF, 2015 WL 1738152 (N.D. Cal. Apr. 13, 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services,* No. 1:12-cv-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA).

[7] For the reasons expressed in my *Murphy Oil* partial dissent, and those thoroughly explained in former Member Johnson's partial dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil,* above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

motion is also supported by the multitude of court decisions that have enforced similar agreements.[8] As the Fifth Circuit recently observed after rejecting (for the second time) the Board's position regarding the legality of class waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D. R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."[9] I also believe that any Board finding of a violation based on the Respondent's meritorious federal court Motion to Compel Arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB,* 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil,* above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the Charging Party for its attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

Accordingly, as to these issues,[10] I respectfully dissent.

Dated, Washington, D.C. December 1, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

[8] See, e.g., *Murphy Oil USA, Inc. v. NLRB*, above; *Johnmohammadi v. Bloomingdale's,* 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB,* above; *Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP,* 726 F.3d 290 (2d Cir. 2013).

[9] *Murphy Oil USA, Inc. v. NLRB*, above, at *6.

[10] Putting aside the validity of the class waiver provisions, I agree with my colleagues that the Agreement unlawfully interferes with the filing of charges with the Board. Although the Agreement states that it "does not limit an employee's ability to complete any external administrative remedy (such as with the EEOC)," this does not reasonably encompass the filing of Board charges. In particular, under the NLRB's procedures, a charge represents the mere commencement of Board proceedings, followed by a lengthy multiple-step progression including the potential issuance of a complaint, a possible hearing before an administrative law judge, the filing with the Board of potential exceptions to the judge's decision and recommended order, and potential compliance proceedings (among other things). Consequently, charge-filing with the Board does not in any sense "complete" the Board's administrative "remedy," so the carve-out in Respondent's Agreement does not reasonably encompass NLRB charge-filing. To this extent, I agree that the Agreement violates Sec. 8(a)(1). See *U-Haul Co. of California,* 347 NLRB 375, 377 (2006), enfd. mem. 255 Fed.Appx. 527 (D.C. Cir. 2007).

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all applicants and current and former employees who were required to sign or otherwise become bound to the mandatory arbitration agreement in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

WE WILL notify the court in which Sarah Hickey, Amy Gulden, and Jay Ragsdale filed their collective lawsuit that we have rescinded or revised the mandatory arbitration agreement upon which we based our motion to dismiss their collective lawsuit and compel individual arbitration, and WE WILL inform the courts that we no longer oppose Sarah Hickey, Amy Gulden, and Jay Ragsdale's collective lawsuit on the basis of that agreement.

WE WILL reimburse Sarah Hickey, Amy Gulden, and Jay Ragsdale for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motion to dismiss their collective lawsuit and compel individual arbitration.

BRINKER INTERNATIONAL PAYROLL COMPANY L.P.

The Board's decision can be found at www.nlrb.gov/case/27-CA-110765 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all applicants and current and former employees who were required to sign or otherwise become bound to the mandatory arbitration agreement in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

BRINKER INTERNATIONAL PAYROLL COMPANY, L.P.

The Board's decision can be found at www.nlrb.gov/case/27-CA-110765 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Renee C. Barker, Esq., for the General Counsel.
Kevin C. Berens, Esq. and *Ross M. Gardner, Esq. (Jackson Lewis, PC)*, of Omaha, Nebraska, for the Respondent.
David H. Miller, Esq. and *Leslie Krueger-Pagett, Esq. (The Sawaya & Miller Law Firm)*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge in Case No. 27–CA–110765, filed on August 7, 2013, by The Sawaya & Miller Law Firm (Charging Party), a complaint and notice of hearing (the Complaint) issued on January 30, 2014. The Complaint alleges that Brinker International Payroll Company LP (Brinker or Respondent), violated Section 8(a)(1) of the Act by maintaining and requiring as a condition of employment that employees execute an agreement to arbitrate which interferes with, restrains, and coerces them in the exercise of their Section 7 rights. Respondent filed an answer

denying the Complaint's material allegations. On March 31, 2014, the parties filed a joint motion to waive hearing and submit case to the Administrative Law Judge and joint Stipulation of Facts, pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations.

On the joint Stipulation of Facts submitted by the parties, the parties' Statements of Issues and Statements of Position, and their Briefs to the Administrative Law Judge, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material to the complaint's allegations, Respondent has been a Delaware limited partnership with BIPC Management LLC as its general partner and BIPC Investments LLC as its limited partner, and has been a wholly owned subsidiary of Brinker International, Inc., a Delaware corporation. At all material times, Respondent has been engaged in the business of employing the employees working in Maggiano's Little Italy Restaurants (Maggiano's) throughout the United States, including Maggiano's Little Italy Restaurants located in the Denver, Colorado area. Respondent admits and I find that at all material times it has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Agreement to Arbitrate

Since at least January 7, 2013, Respondent has maintained an Agreement to Arbitrate, which all Maggiano's employees are required to execute as a condition of their employment. Respondent engages in the promulgation, dissemination, maintenance, modification, rescission and enforcement of the Agreement to Arbitrate. At all material times, the Agreement to Arbitrate has included the following language:

> . . . This agreement applies to all disputes involving legally protected rights (e.g. local, state and federal statutory, contractual or common law rights) regardless of whether the statute was enacted or the common law doctrine was recognized at the time this agreement was signed. This agreement does not limit an employee's ability to complete any external administrative remedy (such as with the EEOC).
>
> . . . .
>
> This Agreement to Arbitrate substitutes on legitimate dispute resolution form (arbitration) for another (litigation), thereby waiving the right of either party to have the dispute resolved in court. This substitution involves no surrender, by either party, of the substantive statutory or common law benefits, protection or defense for individual claims. You do waive the right to commence or be a party to any representative, collective or class action.
>
> . . . .
>
> The arbitrator may not consolidate more than one person's claims and may not otherwise preside over any form of a representative, collective or class proceeding.

B. The Federal Class Action Litigation

Sarah Hickey, Amy Gulden, and Jay Ragsdale are former employees of Respondent, who were employed at Maggiano's restaurants in the Denver, Colorado area. Hickey, Gulden and Ragsdale all signed the Agreement to Arbitrate in June 2012.

On April 1, 2013, the Charging Party filed a class action complaint on behalf of Hickey, Gulden, and Ragsdale, as individual plaintiffs and on behalf of all others similarly situated, in the United States District Court for the District of Colorado. This complaint alleged that Respondent violated the Fair Labor Standards Act and the Colorado Wage Act, and contained allegations of tortuous interference with contract, quantum meruit and unjust enrichment, and breach of contract. For purposes of clarity, this action, Civil Action No. 13-cv-00951-REB-BNB, will be referred to as the "FLSA action" or the "FLSA litigation."

On August 12, 2013, Respondent filed a motion to compel arbitration of individual claims and to dismiss class action claims, collective action claims, and other proceedings in the FLSA action. Respondent argued that the plaintiffs' claims were subject to the provisions of the Arbitration Agreement, which prohibits class or collective claims and requires that employment-related disputes be individually arbitrated. Respondent contended that the complaint should therefore be dismissed pursuant to the Federal Arbitration Act. On February 18, 2014, the District Court issued an Order granting Respondent's motion to compel, dismissing plaintiffs' class and collective action claims with prejudice, and ordering the parties to arbitrate plaintiffs' individual claims. On February 20, 2014, the District Court issued a final judgment to that effect.

On March 20, 2014, the Charging Party filed a notice of appeal with the United States District Court for the District of Colorado, appealing the District Court's order granting Respondent's motion to compel to the United States Court of Appeals for the Tenth Circuit.

III. ANALYSIS AND CONCLUSION

A. The Positions of the Parties

General Counsel contends that Respondent's maintenance of the Agreement to Arbitrate violates Section 8(a)(1) of the Act, pursuant to *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), in that it prohibits employees from initiating or pursuing class or collective actions in any forum. General Counsel further asserts that the Agreement to Arbitrate may be reasonably interpreted by employees as precluding their right to file unfair labor practice charges with the National Labor Relations Board, and thus tends to chill employees in the exercise of their Section 7 rights. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd., 203 F.3d 52 (D.C. Cir. 1999). Finally, General Counsel argues that by filing the motion to compel in the FLSA action, seeking to enforce the unlawful Agreement to Arbitrate, Respondent further violated Section 8(a)(1) of the Act.

Respondent contends that the Agreement to Arbitrate does not violate Section 8(a)(1). Respondent argues that a finding that the Agreement to Arbitrate violates Section 8(a)(1) is precluded by the Supreme Court's decision in *AT&T Mobility,*

LLC v. Concepcion, --- U.S. ---, 131 S.Ct. 1740 (2011), holding that the Federal Arbitration Act requires that arbitration agreements including class action waivers should be enforced pursuant to their terms. Respondent asserts that in subsequent cases, the Supreme Court has stated that without a specific "Congressional command" in a federal statute's text, the statute will not be interpreted to override the Federal Arbitration Act in this respect. *Compucredit Corp. v. Greenwood*, --- U.S. ---, 132 S.Ct. 665 (2012); *American Express Co. v. Italian Colors Restaurant*, --- U.S. ---, 133 S.Ct. 2304 (2013). Respondent notes that all federal Courts of Appeal facing the issue have rejected the Board's holding in *D. R. Horton*, including the Fifth Circuit when deciding the Petition for Review of the Board's Decision and Order. *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). As a result, Respondent argues that *D. R. Horton* should not be applied in this case, and that the Agreement to Arbitrate was lawful.

Respondent advances additional arguments in support of its contention that the Agreement to Arbitrate does not violate the Act. Respondent contends that at the time the *D. R. Horton* Decision was issued by the Board, the Board did not have a valid quorum, and the Board's Decision is therefore inoperative. Respondent further argues that the Agreement to Arbitrate, unlike the arbitration agreement at issue in *D. R. Horton*, explicitly excludes claims filed with federal administrative agencies, and therefore does not affect employees' exercise of their Section 7 rights. Respondent also asserts that the Complaint is time-barred pursuant to Section 10(b) of the Act.

B. The Agreement to Arbitrate

The evidence establishes that the Agreement to Arbitrate requires Respondent's employees to waive any right to pursue class or collective claims pertinent to their employment, in any forum. After limiting the forum for resolution of disputes between the employee and Respondent to arbitration, the Agreement to Arbitrate provides that employees "waive the right to commence or be a party to any representative, collective or class action." The Agreement to Arbitrate further states that "The arbitrator may not consolidate more than one person's claims and may not otherwise preside over any form of a representative, collective or class proceeding."

By requiring that employees waive their right to pursue claims collectively in any forum, the Agreement to Arbitrate violates Section 8(a)(1) of the Act, pursuant to *D. R. Horton.* 357 NLRB No. 184 at 12–13. In *D. R. Horton*, the Board held that class or collective legal action on the part of employees, regardless of the particular forum involved, is a form of activity "at the core of what Congress intended to protect by adopting the broad language of Section 7," and is therefore "central to the Act's purposes." *D. R. Horton*, 357 NLRB No. 184 at 3. As a result, the Board held that "employers may not compel employees to waive their NLRA right to collectively pursue litigation and employment claims in *all* forums, arbitral and judicial." *D. R. Horton*, 357 NLRB No. 184, at 12 (emphasis in original). Because the Agreement to Arbitrate precludes Respondent's employees from initiating or pursuing any class or collective claim in any forum, Respondent's maintenance and enforcement of the Agreement to Arbitrate violates Section 8(a)(1), as alleged in the complaint.

Respondent's arguments regarding the legal infirmity of the Board's *D. R. Horton* decision must be addressed to the Board itself, and not to an Administrative Law Judge. It is well-settled that the Board generally applies a "non-acquiescence policy" with respect to contrary views of the federal Courts of Appeal. See *D. L. Baker, Inc.*, 351 NLRB 515, 529, fn. 42 (2007); *Pathmark Stores, Inc.*, 342 NLRB 378, fn. 1 (2004). Thus, the Administrative Law Judge is required to "apply established Board precedent which the Supreme Court has not reversed." *Pathmark Stores, Inc.*, 342 NLRB at 378, fn. 1; see also *Gas Spring Co.*, 296 NLRB 84, 97–98 (1989), enfd. 908 F.2d 966 (4th Cir. 1990). Although Respondent contends that the Supreme Court's decision in *ATT Mobility v. Concepcion* obviates the legal viability of *D. R. Horton*, the Board in *D. R. Horton* considered and distinguished that opinion given the number and scope of the contracts involved, and the conflict between the Federal Arbitration Act and state law at issue in the Supreme Court case. *D. R. Horton*, 357 NLRB No. 184, at p. 11–12, discussing *AT&T Mobility v. Concepcion*, 130 S.Ct. at 1748, 1750–1752. The subsequent Supreme Court decisions cited by Respondent as requiring a "contrary Congressional command" in order to forego enforcement of an otherwise valid arbitration agreement do not explicitly overrule the Board's *D. R. Horton* decision. *Compucredit Corp. v. Greenwood*, --- U.S. ---,132 S.Ct. 665, 668–669 (2012); *American Express Co. v. Italian Colors Restaurant*, --- U.S. ---, 133 S.Ct. 2304, 2309 (2013). As a result, Respondent's argument that the Agreement to Arbitrate lawfully precludes class or collective legal actions because no "contrary Congressional command" requires that a waiver be rejected is also appropriately addressed solely to the Board itself.[1]

Respondent also points out that the Fifth Circuit when deciding the Petition for Review of *D. R. Horton* refused to enforce the portion of the Board's decision and order finding that an arbitration agreement which eliminated the right to initiate and pursue class or collective claims violated Section 8(a)(1). *D. R. Horton, Inc. v. NLRB*, 737 F.3d at 362. Respondent notes that other Circuits addressing the issue have held that arbitration agreements requiring the waiver of class or collection actions do not violate Section 8(a)(1). *Richards v. Ernst & Young, LLP*, 734 F.3d 871 (9th Cir. 2013); *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bistol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013). Regardless of this case law, as discussed above an Administrative Law Judge is bound by the decisions of the Board, including *D. R. Horton*, until

[1] Respondent cites the Decision and Recommended Order of Administrative Law Judge Bruce D. Rosenstein in *Chesapeake Energy Corp.*, JD–78–13 (November 8, 2013), in further support of its argument that the Board's holding in *D. R. Horton, Inc.* is no longer tenable in light of the Supreme Court's opinion in *American Express Co.* Judge Rosenstein's Decision, which is now before the Board on Exceptions and Cross-Exceptions, is not precedential, and therefore I decline to find, as suggested by Respondent, that *D. R. Horton* is no longer effective, given the well-settled case law regarding an Administrative Law Judge's duty to apply established and unreversed precedent discussed here.

overturned by the Board or the Supreme Court. See *Pathmark Stores, Inc.*, 342 NLRB at 378, fn. 1; *Waco, Inc.*, 273 NLRB 746, 749, fn. 14 (1984); *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), enf. granted in part, 331 F.2d 176 (8th Cir. 1964). Therefore, Respondent's contentions based upon the decisions of the federal Courts of Appeal must also be directed to the Board.

Respondent further contends that the Board's decision in *D. R. Horton* is invalid, because the Board lacked a valid quorum at the time the decision issued. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted, 81 U.S.L.W. 3629 (June 24, 2013). The Board has repeatedly held that because this issue has not been definitively resolved given the conflicting opinions of at least three other Circuits, the Board "is charged to fulfill its responsibilities under the Act." See, e.g., *Universal Lubricants, LLC*, 359 NLRB No. 157 at fn. 1 (2013); *Belgrove Post Acute Care Center*, 359 NLRB No. 77, at p. 1 (2013). As a result, Respondent's argument regarding the lack of a valid Board quorum must be rejected.

Respondent's argument that the Complaint in this matter is time-barred pursuant to Section 10(b) of the Act is also unpersuasive. It is well-settled that where, as here, a rule violating Section 8(a)(1) is maintained during the 10(b) period, a violation is established even if the rule was promulgated prior to that time. See, e.g., *Register Guard*, 351 NLRB 1110, fn. 2 (2007), enf. granted and denied in part, 571 F.3d 53 (D.C.Cir. 2009). Although Respondent contends that the instant case involves not rules but agreements, which were executed in 2009, the Board has repeatedly treated mandatory arbitration policies, whether specifically executed by employees or not, as work rules subject to this particular Section 10(b) analysis. See *Supply Technologies, LLC*, 359 NLRB No. 38 at p. 1–4 (2012); *2 Sisters Food Group*, 357 NLRB No. 168 at p. 1–2 (2011); *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. 255 Fed.Appx. 527 (D.C.Cir. 2007). As a result, I find that the allegation that the Agreement to Arbitrate violates Section 8(a)(1) is not barred by Section 10(b) of the Act.

For all of the foregoing reasons, I find that the Agreement to Arbitrate, by prohibiting Respondent's employees from initiating or pursuing any class or collective claim in any forum, violates Section 8(a)(1) of the Act pursuant to the Board's decision in *D. R. Horton*.

General Counsel further contends that the Agreement to Arbitrate violates Section 8(a)(1) in that it may reasonably be interpreted to preclude the filing of unfair labor practice charges, and would therefore tend to chill the employees' exercise of their rights under Section 7. It is well settled that an employer's maintenance of a work rule which reasonably tends to chill employees' exercise of their Section 7 rights violates Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB at 825. A particular work rule which does not explicitly restrict Section 7 activity will be found unlawful where the evidence establishes one of the following: (i) employees would "reasonably construe the rule's language" to prohibit Section 7 activity; (ii) the rule was "promulgated in response" to union or protected concerted activity; or (iii) "the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). The Board has cautioned that rules must be afforded a "reasonable" interpretation, without "reading particular phrases in isolation" or assuming "improper interference with employee rights." *Lutheran Heritage Village-Livonia*, 343 NLRB at 646. Ambiguities in work rules are construed against the party which promulgated them. See *Supply Technologies, LLC*, 359 NLRB No. 38 at p. 3; *Lafayette Park Hotel*, 326 NLRB at 828.

I find that employees would reasonably interpret Respondent's Agreement to Arbitrate as prohibiting them from filing unfair labor practice charges, and that Respondent's maintenance of the Agreement as a condition of employment therefore violates Section 8(a)(1) on this basis as well. The Agreement to Arbitrate contains broad language regarding the scope of its applicability. It begins by stating that Respondent "has provided for the resolution of *all disputes that arise between you and Brinker* through formal, mandatory arbitration before a neutral arbitrator" if those disputes cannot be resolved through Respondent's internal procedures (emphasis added). As set forth above, the Agreement to Arbitrate provides that it

> . . . applies to *all disputes involving legally protected rights (e.g. local, state and federal statutory, contractual or common law rights)* regardless of whether the statute was enacted or the common law doctrine was recognized at the time this agreement was signed

(emphasis added). The Agreement to Arbitrate also states that it "substitutes one legitimate dispute resolution forum (arbitration) for another (litigation), thereby waiving any right of either party to have the dispute resolved in court." The Board has repeatedly held that sweeping language in defining the issues subject to solely arbitral resolution is reasonably interpreted by employees to encompass and prohibit the filing of unfair labor practice charges. See *Supply Technologies, LLC*, 359 NLRB No. 28 at p. 1–4 (agreement requiring that employees "bring any claim of any kind," including "claims relating to my application for employment, my employment, or the termination of my employment" solely to employer's alternative dispute resolution program reasonably interpreted as prohibiting the filing of unfair labor practice charges); *2 Sisters Food Group*, 357 NLRB No. 168 at p. 1–2, 22 (policy requiring that employees submit "all [employment] disputes and claims" to arbitration could be reasonably interpreted to preclude the filing of charges with the Board); *U-Haul Co. of California*, 347 NLRB at 377–378 (agreement requiring arbitration of "all disputes relating to or arising out of an employee's employment . . . or the termination of that employment," including "any other legal or equitable claims and causes of action recognized by local, state, or federal law or regulations" violated Section 8(a)(1)).

I further find that the Agreement's language providing that it "does not limit an employee's ability to complete any external administrative remedy (such as with the EEOC)" is insufficient to indicate to a reasonable employee that the Agreement does not prohibit the filing of unfair labor practice charges with the Board. This language does not explicitly exclude unfair labor practice charges filed with the National Labor Relations Board from the Agreement's requirement that all employment-related claims be resolved in the context of arbitration. See *Supply Technologies, LLC*, 359 NLRB No. 38 at p. 2 (NLRB unfair

labor practice charges not among enumerated exceptions to policy requiring arbitration of employment disputes); *2 Sisters Food Group, Inc.*, 357 NLRB No. 168 at p. 2 (same).[2] Furthermore, in the context of the reasonable interpretation analysis the Board has eschewed any assumption that employees have specialized legal knowledge or experience which they would bring to bear on an arbitration agreement's language. For example, in *2 Sisters Food Group, Inc.*, the Board found that language limiting the employer's policy to claims "that may be lawfully [] resolve[d] by arbitration" was not susceptible to the interpretation by "most nonlawyer employees," who would be unfamiliar with the Act's limitations on compulsory arbitration, that unfair labor practice charges were thereby excluded. 357 NLRB No. 168 at p. 2. Similarly, in *U-Haul Co. of California*, the Board concluded that employees without legal training could not be reasonably expected to understand that language limiting arbitration to disputes or claims "that a court of law would be authorized to entertain or would have jurisdiction over" consequently excluded unfair labor practice charges from the scope of the agreement. 347 NLRB at 377–378. Here, there is no basis to assume that a reasonable employee, unversed in labor and employment law, would understand the statement "This agreement does not limit an employee's ability to complete any external administrative remedy" to include filing an unfair labor practice charge with the Board, even if the agency were specifically mentioned. This is particularly the case in light of the Agreement's preceding language stating that "all disputes" arising between the employee and Respondent, and "all disputes involving legally protected rights" may only be resolved through arbitration.

For all of the foregoing reasons, I find that employees would reasonably interpret the Agreement to Arbitrate as prohibiting the filing of unfair labor practice charges, and that Respondent's maintenance of the Agreement to Arbitrate as a condition of employment violated Section 8(a)(1) as a result.

C. The Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims Filed by Respondent

I find, as General Counsel argues, that Respondent violated Section 8(a)(1) of the Act by enforcing the Agreement to Arbitrate when it filed the Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims in the FLSA litigation. I find that Respondent's Motion to Compel had an illegal objective within the meaning of *Bill Johnson's Restaurants* and its progeny, in that it constituted both an attempt to enforce a policy which was in and of itself unlawful and an effort to directly proscribe employees' protected activity. As a result, Respondent violated Section 8(a)(1) by filing the Motion to Compel.

In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 740–744, 748 (1983), the Supreme Court, formulating an accommodation between employee Section 7 rights and the First Amendment right of parties to petition the government for redress of grievances, held that only lawsuits motivated by a desire to retaliate against the exercise of Section 7 rights which lacked a reasonable basis in fact or law violated Section 8(a)(1) of the Act. However, the Supreme Court explicitly excluded from this analysis lawsuits filed with "an objective that is illegal under federal law." *Bill Johnson's Restaurants*, 461 U.S. at 737–738, fn. 5. In such cases, "the legality of the lawsuit enjoys no special protection under *Bill Johnson's*." *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991), enfd. 973 F.2d 230 (3rd Cir. 1992). Subsequently, in *BE & K Construction Co. v. NLRB*, the Court invalidated the Board's rule that an unsuccessful lawsuit filed for retaliatory reasons violated the Act even if reasonably based. 536 U.S. 516, 529–530 (2002). On remand, the Board held that the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of the party's motive for bringing it, so that only lawsuits which are "both objectively and subjectively baseless" are unlawful. *BE & K Construction Co.*, 351 NLRB 451, 458 (2007). However, since *BE & K Construction Co.*, the Board has repeatedly held that the Supreme Court's opinion in that case "did not alter the Board's authority to find court proceedings that have an illegal objective under federal law to be an unfair labor practice." *Dilling Mechanical Contractors*, 357 NLRB No. 56, at p. 3 (2011); *Plasterers Local 200 (Standard Drywall)*, 357 NLRB No. 179, at p. 3, fn. 7 (2011), enfd. 547 Fed.Appx. 812 (9th Cir. 2013), and 357 NLRB No. 160, p. 3 (2011), enfd. 547 Fed.Appx. 809 (9th Cir. 2013); *Manufacturers Woodworking Assn. of Greater New York, Inc.*, 345 NLRB 538, 540, fn. 7 (2005); see also *Can-Am Plumbing v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003). As a result, lawsuits motivated by an illegal objective remain exempt from the *Bill Johnson's* and *BE & K* analysis, and violate the Act.

In addition, the Board has held that specific actions taken by a party in the context of litigation may have an illegal objective, and therefore violate Section 8(a)(1), even if the underlying lawsuit itself does not. In particular, the Board has held that discovery requests which seek information regarding employees' participation in union activity have an illegal objective, and therefore violate Section 8(a)(1). See *Dilling Mechanical Contractors*, 357 NLRB No. 56, at p. 1, 3 ("discovery requests" seeking the names of employees who had joined the union had an illegal objective and therefore violated Section 8(a)(1)); *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000) (discovery request seeking the identities of employees who signed collective-bargaining authorizations unlawful).

I find that Respondent's Motion to Compel in the instant case had an illegal objective in that it was an attempt to enforce the unlawful Agreement to Arbitrate. It is well-settled, as discussed in the Supreme Court's *Bill Johnson's* opinion, that lawsuits which attempt to enforce contract provisions and policies which violate the Act in and of themselves constitute independent statutory violations. *Bill Johnson's Restaurants*, 461 U.S. at 737–738, fn. 5, citing *Granite State Joint Board, Textile Workers Union*, 187 NLRB 636, 637 (1970), enf. denied, 446 F.2d 369 (1st Cir. 1971), revd., 409 U.S. 213 (1972) and *Booster Lodge No. 405*, 185 NLRB 380, 385 (1970), enfd., 459 F.2d

[2] I note that the Board has found that even language explicitly referring to an employee's responsibility to "timely file any charge with the NLRB" is insufficient to clarify a broad mandatory grievance and arbitration policy such that the policy would not be reasonably interpreted to prohibit the filing of unfair labor practice charges in violation of Section 8(a)(1). See *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007).

1143 (D.C. Cir. 1972), affd., 412 U.S. 84 (1973) (noting that the Court had "upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act"); see also *Regional Construction Corp.*, 333 NLRB 313, 319 (2001) (illegal objective extant in "cases where the underlying acts constitute unfair labor practices and the lawsuit is simply an attempt to enforce the underlying act"). In this case, Respondent's Motion to Compel constituted an effort to enforce the Agreement to Arbitrate which, for the reasons discussed above, violates Section 8(a)(1) of the Act in and of itself. The filing of the Motion to Compel consequently violated Section 8(a)(1) as well.

In addition, the Motion to Compel violated Section 8(a)(1) as an attempt to directly prevent employees from engaging in activity protected by Section 7. The Board has repeatedly found that lawsuits designed to prevent employees' Section 7 activity have an illegal objective, and therefore violate Section 8(a)(1). For example, in *Federal Security, Inc.*, the Board determined that a lawsuit alleging that employees engaged in abuse of process and malicious prosecution by filing an unfair labor practice charge and providing evidence to the Board had the illegal objective of seeking to punish and deter access to Board processes, activity protected by Section 7. 359 NLRB No. 1, at p. 13–14 (2012). See also *Manno Electric*, 321 NLRB 278, fn. 5, 295–298 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (lawsuit alleging that employees' made "false" statements in "bad faith" to the Board had illegal objective and therefore violated Section 8(a)(1)); and see *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990) (union grievance premised upon an interpretation of its collective-bargaining agreement which would violate Section 8(e) of the Act had an illegal objective).

Here, the Motion to Compel, in that it sought dismissal of the employees' class or collective claims, attempted to directly interfere with employee' activity protected by Section 7. As the Board explained in *D. R. Horton*, collective efforts to address workplace grievances through arbitration and litigation constitute protected concerted activity, and thus "an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7." 357 NLRB No. 184, at p. 3. The Motion to Compel in the instant case, by urging the district court to dismiss the employees' class or collective claims, sought to directly prevent them from engaging in activity protected under Section 7. The Motion to Compel therefore had an illegal objective, and Respondent's filing of the Motion violated Section 8(a)(1) on this basis as well.[3]

For all of the foregoing reasons, I find that Respondent's Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims in the FLSA litigation had an illegal objective, and therefore violated Section 8(a)(1) of the Act.

[3] Because I find that Respondent's Motion to Compel had an illegal objective, I do not find, as Respondent argues, that the instant case violates Respondent's First Amendment right to defend itself in the FLSA litigation, and should be stayed pending the outcome of the FLSA litigation as a result.

CONCLUSIONS OF LAW

1. The Respondent, Brinker International Payroll Company, L.P., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By maintaining a mandatory arbitration policy which employees are required to sign as a condition of their employment, requiring that employees waive their right to pursue class or collective claims in any forum, Respondent has violated Section 8(a)(1) of the Act.

3. By maintaining a mandatory arbitration policy which employees are required to sign as a condition of their employment, which would be reasonably interpreted as prohibiting employees from filing unfair labor practice charges with the Board, Respondent has violated Section 8(a)(1) of the Act.

4. By filing a Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims, Collective Action Claims, and other Proceedings, on August 12, 2013, in the United States District Court for the District of Colorado in Civil Action No. 13-cv-00951-REB-BNB, in order to enforce its Agreement to Arbitrate, Respondent violated Section 8(a)(1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondent maintained a mandatory arbitration policy, the Agreement to Arbitrate, which requires that employees waive their right to purse class or collective action claims in any forum, and may be reasonably interpreted as prohibiting employees from filing unfair labor practice charges. I therefore recommend that Respondent be ordered to rescind the Agreement to Arbitrate, and to provide the employees with specific notification that the Agreement has been rescinded. I recommend that Respondent be ordered to alternatively revise the Agreement to Arbitrate to clarify that it does not constitute a waiver in all forums of the employees' right to maintain employment-related class or collective claims, and does not restrict employees' right to file unfair labor practice charges with the National Labor Relations Board, and to notify the employees of the revised agreement, including providing the employees with a copy of the revised agreement. Because Respondent required that its employees at all dine-in public Maggiano's Little Italy Restaurants throughout the nation execute the Agreement to Arbitrate as a condition of their employment, I will recommend that Respondent post a notice in all locations where the Agreement to Arbitrate was utilized. *D. R. Horton, Inc.*, 357 NLRB No. 184 at p. 13; *U-Haul Co. of California*, 347 NLRB at 375, fn. 2; see also *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part, 475 F.3d 369 (D.C. Cir. 2007).

In addition, I recommend that Respondent be ordered to file, together with the Charging Party, a joint motion to vacate the District Court's February 18, 2014 Order granting Respondent's Motion to Compel, dismissing plaintiffs' class and collective action claims with prejudice, and ordering the parties to arbitrate plaintiffs' individual claims in Civil Action No. 13-cv-00951-REB-BNB. This action is necessary to fully remedy the violation, because the Motion to Compel had an illegal objective and was therefore unlawful from its inception, and should never have been filed or granted. *Manno Electric*, 321 NLRB at 297–298. The Board has in previous cases ordered respondents to take such specific actions to remedy the effects of having prosecuted lawsuits engendered by an illegal objective, or otherwise unlawful pursuant to *Bill Johnson's* and related cases. *Federal Security, Inc.*, 359 NLRB No. 1, at p. 13–14 (respondent ordered to withdraw or seek to dismiss lawsuit filed with an illegal objective, and have default orders vacated); *Federal Security, Inc.*, 336 NLRB 703, fn. 3, 704 (2001); see also *Loehmann's Plaza*, 305 NLRB 663, 673 (1991) (ordering respondent to seek to have a permanent injunction against peaceful picketing and handbilling withdrawn); *Baptist Memorial Hospital*, 229 NLRB 45, 45–46 (1977), enfd., 568 F.2d 1 (6th Cir. 1977) (ordering respondent to file a joint petition to expunge an arrest and conviction record created by police action initiated by respondent's unlawful conduct). The filing of such a joint motion shall be at the Charging Party's request and subject to the time limitations for doing so pursuant to the Federal Rules of Civil Procedure.

I further recommend that Respondent be ordered to reimburse Sarah Hickey, Amy Gulden, Jay Ragsdale, and any other affected employees for any litigation and related expenses incurred, to date and in the future, directly related to Respondent's Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims in Civil Action No. 13-cv-00951-REB-BNB in the United States Court for the District Colorado. See *Federal Security, Inc.*, 359 NLRB No. 1, at p. 14. The applicable rate of interest on the reimbursement will be determined pursuant to *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and interest on all amounts due to the employees shall be computed on a daily basis pursuant to *Kentucky River Medical Center,* 356 NLRB No. 8 (2010), enf. denied on other grounds, 647 F.3d 1137 (D.C. Cir. 2011).

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, I issue the following recommended[4]

ORDER

Respondent, Brinker International Payroll Company, L.P., a Delaware limited partnership, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration policy which requires that employees waive their right to pursue class or collective claims in any forum.

(b) Maintaining a mandatory arbitration policy which would be reasonably interpreted as prohibiting employees from filing unfair labor practice charges with the National Labor Relations Board

(c) Filing motions to enforce its Agreement to Arbitrate, to thereby compel individual arbitration and preclude employees from pursuing employment-related disputes with Respondent on a class or collective basis in any forum.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the Agreement to Arbitrate to make clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions, and does not restricted employees' right to file unfair labor practice charges with the National Labor Relations Board.

(b) Notify the employees of the rescission or the revised agreement, and provide them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

(c) Within 7 days after service by the Region, file, together with the Charging Party, a joint motion to vacate the District Court's February 18, 2014 Order granting Respondent's Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims, dismissing plaintiffs' class and collective action claims with prejudice, and ordering the parties to arbitrate plaintiffs' individual claims in Civil Action No. 13-cv-00951-REB-BNB in the United States Court for the District Colorado. Such filing shall be at the Charging Party's request and subject to the time limitations for doing so pursuant to the Federal Rules of Civil Procedure.

(d) Reimburse Sarah Hickey, Amy Gulden, Jay Ragsdale, and any other affected employees for any litigation and related expenses incurred, to date and in the future, directly related to Respondent's Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims in Civil Action No. 13-cv-00951-REB-BNB in the United States Court for the District Colorado.

(e) Within 14 days after service by the Region, post at all dine-in Maggiano's Little Italy Restaurants where the Agreement to Arbitrate was utilized by Respondent copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site

[4] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

and/or other electronic means if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: Washington, DC June 4, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration policy which requires that employees waive their right to pursue class or collective claims in any forum.

WE WILL NOT maintain a mandatory arbitration policy which would be reasonably interpreted as prohibiting employees from filing unfair labor practice charges with the National Labor Relations Board.

WE WILL NOT enforce or attempt to enforce a mandatory arbitration policy in order to compel individual arbitration and preclude employees from pursuing employment-related disputes with Respondent on a class or collective basis.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL rescind or revise our Agreement to Arbitrate to make clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions, and does not restrict employees' rights to file unfair labor practice charges with the national Labor Relations Board.

WE WILL notify the employees of the rescinded or revised Agreement to Arbitrate, and provide them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

WE WILL within 7 days after service by the Region, file, at the Charging Party's request and together with the Charging Party, a joint motion to vacate the District Court's February 18, 2014 Order granting the Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims in Civil Action No. 13-cv-00951-REB-BNB in the United States Court for the District Colorado, to the extent that the motion may be filed under the rules which apply in the District Court.

WE WILL reimburse Sarah Hickey, Amy Gulden, Jay Ragsdale, and any other affected employees for any litigation and related expenses incurred plus interest, to date and in the future, directly related to the Motion to Compel Arbitration of Individual Claims and to Dismiss Class Action Claims in Civil Action No. 13-cv-00951-REB-BNB in the United States Court for the District Colorado.

BRINKER INTERNATIONAL PAYROLL COMPANY LP, A LIMITED PARTNERSHIP

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

December 09, 2015

Ms. Linda Dreeben
National Labor Relations Board
Appellate & Supreme Court Litigation Branch
1015 Half Street, S.E.
Suite 4163
Washington, DC 20570

Ms. Martha Elaine Kinard
National Labor Relations Board
Region 16
819 Taylor Street
Room 8A24
Fort Worth, TX 76102-6178

No. 15-60859 Brinker Intl Payroll Co., LP v. NLRB
Agency No. 27-CA-110765

Dear Ms. Dreeben, and Ms. Kinard,

You are served with the following document(s) under FED R. APP. P. 15:

Petition for Review.

See FED R. APP. P. 16 and 17 as to the composition and time for the filing of the record. If the agency intends to file a certified list in lieu of the administrative record, it is *required* to be filed electronically. Paper filings will not be accepted.

Counsel who desire to appear in this case must electronically file a "Form for Appearance of Counsel" within 14 days from this date. You must name each party you represent, see FED R. APP. P. and 5TH CIR. R. 12. The form is available from the Fifth Circuit's website, www.ca5.uscourts.gov. If you fail to electronically file the form, we will remove your name from our docket. Also, we cannot release official records on appeal unless an appearance has been entered.

ATTENTION ATTORNEYS: Attorneys are required to be a member of the Fifth Circuit Bar and to register for Electronic Case Filing. The "Application and Oath for Admission" form can be printed or downloaded from the Fifth Circuit's website, www.ca5.uscourts.gov.

Information on Electronic Case Filing is available at www.ca5.uscourts.gov/cmecf/.

Sincerely,

LYLE W. CAYCE, Clerk

Sabrina B. Short

By: _____
Sabrina B. Short, Deputy Clerk
504-310-7817

Enclosure(s)

cc w/encl:
Mr. Renee C. Barker
Mr. Kelvin Charles Berens
Mr. Ross Gardner
Ms. Wanda Pate Jones
Ms. Leslie Krueger-Pagett
Mr. David Miller